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CHILDREN AND THE LAW

edited by

Bernard Green

August 1984

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I deeply appreciate the contribution of my research assistant, Ian Arellano, a student in this Faculty, to the preparation of this casebook.

The following also assisted in the preparation of the casebook: Teresa Klimushko and Pat Ward.

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CHAPTER ONE: INTRODUCTION

A. General

Introduction

In ordinary usage, "children" can refer to two different groups: one group characterized by age, the other by a legal relationship between the child and another person, his or her parent.

Our society has determined that a person does not have complete legal rights until he or she has reached a certain age. In this province, by the Age of Majority and Accountability Act, R.S.O. 1980, c. 7, a person is vested with full legal capacity at age 18. The eighteen-year-old can vote, marry without parental consent, enter into contracts, etc. But he or she cannot obtain a drink legally in any bar in Ontario until the following year.

Fixing the age for majority at 18 does not answer many questions: (1) At what age shall we allow young people to drive? To leave school? At what age should a person be fully responsible before the criminal law? (2) Does whatever answer you or society gives answer the question, at what age a person should be allowed to obtain an abortion?

Your answer to the last question may be affected by the second meaning that "children" has, i.e., a legal relationship between the "child" and another person, his or her parent. In our society, the legal relationship is normally a product of biology: a parent-child relationship is created as a result of a man and a woman entering into a relationship which produced a child. The usual non-biological method of creating the parent-child relationship is by adoption. See Part IV of the Child Welfare Act, R.S.O. 1980, c. 66.

The issues we explore in this seminar involve basic problems of political philosophy. More particularly, we are concerned with the allocation of power between the state, the parents and the child. The historical background is provided in the article by Marks, "Detours on the Road to Maturity," (reproduced below); the basic issues are posed in the article by Mnookin and Coons, "Toward a Theory of Children's Rights," (reproduced below). We focus on one specific problem, that of minor's consent to medical procedures.

The response of the legal system to issues involving children may be affected by the introduction into Canadian law of the Charter of Rights and Freedoms, reproduced below.

CHAPTER TWO: CHILD WELFARE LEGISLATION

A. Introduction

Every jurisdiction in North America has legislation that authorizes the state to intervene in the life of the family by removing the child from his or her home if certain conditions are satisfied. Ontario is no exception. The Child Welfare Act, although revised very recently, betrays its nineteenth century origins; see, for example, s. 19(1).

Among the questions you should consider are the following: (1) In what circumstances is the state justified in removing the child from his home? (2) Should this decision be based on a cost-benefit analysis - i.e., if the costs (to whom?) outweigh the benefits (to whom?), should the state refuse to intervene? (3) Is it possible to determine the costs and benefits? (See Mnookin, "Child-Custody Adjudication," reproduced herein.) (4) Is the state concerned about the present situation, or is it really concerned about the future consequences of the present situation? (5) If the latter, do we have an accurate means of predicting future human behaviour? (See Dershowitz, "On Preventive Detention," reproduced herein.)

CHAPTER THREE: JUVENILE DELINQUENCY

A. Introduction

Every (Western) society has had to decide how it will handle persons who are not adults when they have engaged in criminal activity. The responses have taken two basic forms: (1) The North American: on this continent, we have established specialized courts with a special process and special dispositional powers to deal with part of this group. (See the Young Offenders Act, reproduced below. In conjunction with the Young Offenders Act, we have reproduced its predecessor, the Juvenile Delinquents Act. We have done so because the Young Offenders Act has not yet been proclaimed; the cases we reproduce were decided under the Juvenile Delinquents Act.) Those who are above the maximum age for juvenile court jurisdiction are subject to the ordinary process, i.e., trial in adult criminal court.

(2) In some European countries, young people who would be processed in juvenile court in Canada are handled by the ordinary child welfare system. Note that in these countries, too, there is a gap. Thus, in Sweden, the age of criminal responsibility is 15 and anyone 15 years of age or older can be tried in the ordinary criminal courts. See "Measures to Combat Juvenile Delinquency in Sweden," paragraphs 21-24, reproduced below.